Muscle Shoals in Alabama, a privilege or license tax imposed "upon each person, firm, corporation, agent or officer, engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama."

STATUTES INVOLVED

The statutes involved are set out in the Appendix (*infra*, pp. 7–11).

STATEMENT

The United States, having constructed a dam and power plant on the Tennessee River at or near Muscle Shoals, Alabama, under Congressional authority (Act of June 3, 1916, c. 134, Sec. 124, 39 Stat. 166, 215), has been engaged since 1925 in generating hydroelectric power. During the calendar year 1926 it sold to the Alabama Power Company, a private corporation, 429,311,000 kilowatt-hours of hydroelectric power so generated. (R. 6.)

On July 22, 1927, the legislature of the State of Alabama passed a revenue law which levied a license or privilege tax on each person or corporation engaged in the business of manufacturing and selling hydroelectric power in the State of Alabama. Said tax amounted to two-fifths of a mill upon each kilowatt-hour of hydroelectric power manufactured and sold during the preceding calendar year. (R. 6.) The petitioner made demand on the United States for payment of the tax due in 1927. The United States declined to pay the tax. (R. 6–7.)

This suit was thereafter filed by petitioner in the Court of Claims to recover from the United States the amount of the tax for 1927 plus a penalty of fifteen per cent for failure to pay the tax when due. The United States demurred to the petition. The Court of Claims sustained the demurrer and dismissed the petition. (R. 22.)

ARGUMENT

The United States would not oppose a review of the question of construction and of the constitutional question raised if they were the only points involved. The question whether this commercial activity of the United States is exempt from State taxation is important. In *South Carolina* v. *United States*, 199 U. S. 437, the State was denied recovery of license taxes paid to the Federal Government for the privilege of allowing its agents to engage in the retail liquor business. This Court held that where a State engages in business of a private nature that business is not withdrawn from the Federal taxing power. While the exercise of the sovereign functions of a State is immune from Federal taxation, the exercise of its proprietary functions is not. We contend that the United States, unlike a State, can not within its constitutional powers engage in a private business, and that it has not done so in the instant case. *Gillespie* v. *Oklahoma*, 257 U. S. 501. We submit that the opinion of the court below on the merits was correct, but the question of whether the rule of the

South Carolina case can be extended to the United States is novel and important.

But we believe that it is clear that the Court of Claims erred in taking jurisdiction of the case. The petition sets forth no claim "upon any contract, express or implied, with the Government of the United States," nor any claim for damages in a case "not sounding in tort," within the meaning of Section 145 of the Judicial Code (p. 7, *infra*). It states an alleged obligation to pay a privilege or license tax imposed by the legislature of Alabama upon the Federal Government. A State may, like an individual, bring suit in the Court of Claims upon a proper cause of action. *United States* v. *Louisiana*, 123 U. S. 32. But the United States has not consented to be sued upon any ground alleged in the petition, and without such consent the Court of Claims has no jurisdiction. *Schillinger* v. *United States*, 155 U. S. 163.

The nature of a tax obligation is well established. It is sometimes loosely spoken of as a debt, but never as a debt based on any contractual relationship. Cooley's treatise on Taxation (Fourth Edition 1924), Section 22, states:

> A tax is not regarded as a debt in the ordinary sense of that term, for the reason that a tax does not depend upon the consent of the taxpayer and there is no express or implied contract to pay taxes. Taxes are not contracts between party and party, either express or implied; but they are the positive acts of the government, through its various

agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required.

In the following cases State courts have discussed the nature of a tax obligation and decided that it is not founded on contract or agreement. *Camden* v. *Allen*, 26 N. J. L. 398; *Perry* v. *Washburn*, 20 Cal. 318; *Carondelet* v. *Picot*, 38 Mo. 125; *Nebraska City* v. *Gas Company*, 9 Neb. 339; *Pierce* v. *City of Boston*, 3 Mete. (Mass.) 520; *Peter* v. *Parkinson, Treasurer*, 83 Ohio St. 36. This Court in *Lane County* v. *Oregon*, 7 Wall. 71, held that under the Acts of Congress of 1862 and 1863, making United States notes legal tender for debts, "debts" did not include tax obligations imposed by States, and quoted with approval the language used in *Camden* v. *Allen*, *supra*, that "a tax * * * is not founded on contract or agreement." The opinion of this Court in *Meriwether* v. *Garrett*, 102 U. S. 472, 513, draws the same distinction between debts and contractual obligations on the one hand and taxes on the other. In *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corp.*, 6 F. (2d) 752 (C. C. A. 2d), and *St. Joseph Land Co.* v. *MacLean*, 32 F. (2d) 984 (C. C. A. 8th), there are clear statements by the courts that taxes are in no sense contractual.

A debt or contract claim is subject to set-off, but a tax never is. Sums of money owing upon contract draw interest; taxes never do unless the taxing Act expressly provides for it. See *Perry County* v. *Selma M. & M. R. Co.*, 65 Ala. 391, 401.

A contract is based on agreement of the parties; a tax is imposed by the taxing authority with no regard to the taxpayer's consent.

Since the petitioner's claim for taxes is not a claim upon contract, the United States has not under Section 145 of the Judicial Code consented to be sued on such a ground and the Court of Claims should not have taken jurisdiction of the case.

CONCLUSION

The absence of jurisdiction of the Court of Claims seems so clear that we suggest the advisability of a dismissal or denial of the petition expressly upon the ground of want of jurisdiction of that court. If this Court does not feel that it should dispose of the petition in this manner, we do not oppose a review of the constitutional question decided by the Court of Claims, as well as the jurisdictional question.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General
WILLIAM J. HUGHES,
GEORGE H. FOSTER,
BRADLEY B. GILMAN,
ERWIN N. GRISWOLD,
Attorneys.

MAY, 1930.

APPENDIX

STATUTES INVOLVED

Judicial Code, Section 145 (U. S. C., Title 28, Sec. 250), provides in part:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable:
>
> *Provided, however*, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

National Defense Act, Section 124 (Act of June 3, 1916, c. 134, 39 Stat. 166, 215), provides:

> The President of the United States is hereby authorized and empowered to make, or cause to be made, such investigation as in his judgment is necessary to determine the best, cheapest, and most available means for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers and other useful products by water power or any other power as in his judgment is the best and cheapest to use; and is also hereby authorized and empowered to designate for the exclusive use of the United States, if in his judgment such means is best and cheapest, such site or sites, upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.
>
> The President is authorized to lease, purchase, or acquire, by condemnation, gift,

grant, or devise, such lands and rights of way as may be necessary for the construction and operation of such plants, and to take from any lands of the United States, or to purchase or acquire by condemnation materials, minerals, and processes, patented or otherwise, necessary for the construction and operation of such plants and for the manufacture of such products.

The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

The President is hereby authorized and empowered to employ such officers, agents, or agencies as may in his discretion be necessary to enable him to carry out the purposes herein specified, and to authorize and require such officers, agents, or agencies to perform any and all of the duties imposed upon him by the provisions hereof.

The sum of $20,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to enable the President of the United States to carry out the purposes herein provided for.

The plant or plants provided for under this Act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital.

In order to raise the money appropriated by this Act and necessary to carry its provisions into effect, the Secretary of the Treasury, upon the request of the President of the United States, may issue and sell, or use for such purpose or construction hereinabove authorized, any of the bonds of the United States now available in the Treasury of the United States under the Act of August fifth, nineteen hundred and nine, the Act of February fourth, nineteen hundred and ten, and the Act of March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed $20,000,000: *Provided*, That any Panama Canal bonds issued and sold or used under the provisions of this section may be made payable at such time after issue as the Secretary of the Treasury, in his discretion, may deem advisable, and fix, instead of fifty years after date of issue, as in said Act of August fifth, nineteen hundred and nine, not exceeding fifty years.

General Acts of Alabama, 1927, page 139, provide in part:

AN ACT In Reference to and to Further Provide for the General Revenue of the State of Alabama

Be it Enacted by the Legislature of Alabama:

SECTION 1. Every person, firm, company, corporation, or association engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described

for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act or any other act.

SECTION 2. * * * 2-D. In addition to all other taxes of every kind now imposed by law or otherwise imposed by this Act, there is hereby levied a license or privilege tax upon each person, firm, corporation, agent or officer, engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year, and shall be in a sum equal to Two-Fifths of a Mill (2 5) upon each kilowatt hour of hydro-electric power manufactured and sold during the preceding calendar year.

* * * * *

Approved, July 22, 1927.

U. S. GOVERNMENT PRINTING OFFICE: 1930